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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Robert Barbera,

Plaintiff,

v.

Hesperios Inc.,

Defendant.

Case No:

COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiff Robert Barbera (“*Plaintiff*”), by and through his undersigned counsel, for his Complaint against Defendant Hesperios Inc. (“*Defendant*”) states and alleges as follows:

INTRODUCTION

1. This action seeks to recover damages for copyright infringement.
2. Plaintiff herein creates photographic images and owns the rights to these images which Plaintiff licenses for various uses including online and print publications.
3. Defendant owns and operates a social media account on Instagram named as @hesperios (the “*Account*”).
4. Defendant, without permission or authorization from Plaintiff actively copied, stored, and/or displayed Plaintiff's Photograph on the Account and engaged in this misconduct knowingly and in violation of the United States copyright laws.

PARTIES

1 5. Plaintiff Robert Barbera is an individual who is a citizen of the State of New
2 York and maintains a principal place of business 98 Suffolk St., New York in New York City,
3 New York.

4 6. Upon information and belief, Defendant Hesperios Inc., is a New York
5 corporation with a principal place of business at 49 Bleecker Street, New York in New York
6 City, New York and is liable and responsible to Plaintiff based on the facts herein alleged.

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8 **JURISDICTION AND VENUE**

9 7. This Court has subject matter jurisdiction over the federal copyright
10 infringement claims pursuant to 28 U.S.C. §1338(a) and 28 U.S.C. §1331.

11 8. This Court has personal jurisdiction over Hesperios Inc. because it maintains its
12 principal place of business in New York.

13 9. Venue is proper under 28 U.S.C. §1391(a)(2) because Hesperios Inc. does
14 business in this Judicial District and/or because a substantial part of the events or omissions
15 giving rise to the claim occurred in this Judicial District.

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17 **FACTS COMMON TO ALL CLAIMS**

18 10. Plaintiff is a professional photographer by trade who is the legal and rightful
19 owners of photographs which Plaintiff licenses to online and print publications.

20 11. Plaintiff has invested significant time and money in building Plaintiff's
21 photograph portfolio.

22 12. Plaintiff has obtained active and valid copyright registrations from the United
23 States Copyright Office (the "*USCO*") which cover many of Plaintiff's photographs while many
24 others are the subject of pending copyright applications.

25 13. Plaintiff's photographs are original, creative works in which Plaintiff's own
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1 protectable copyright interests.

2 14. Hesperios Inc. is the registered owner of the Account and is responsible for its
3 content.

4 15. Hesperios Inc. is the operator of the Account and is responsible for its content.

5 16. The Account is a popular and lucrative commercial enterprise.

6 17. The Account is monetized in that it advertises Defendant's products and, upon
7 information and belief, Defendant profits from these activities.

8 18. On July 24, 2019, Plaintiff authored a photograph of Bella Hadid in a white top
9 and brown dress (the "*Photograph*"). A copy of the Photograph is attached hereto as Exhibit 1.

10 19. Plaintiff applied to the USCO to register the Photograph on or about August 19,
11 2019 under Application No. 1-7986815841.

12 20. The Photograph was registered by the USCO on August 19, 2019 under
13 Registration No. VA 2-166-069.

14 21. On August 23, 2019 Plaintiff first observed the Photograph on the Account in a
15 story dated August 20, 2019. A copy of the screengrab of the Account including the Photograph
16 is attached hereto as Exhibit 2.

17 22. Without permission or authorization from Plaintiff, Defendant volitionally
18 selected, copied, stored and/or displayed Plaintiff copyright protected Photograph as is set forth
19 in Exhibit "1" on the Account.

20 23. Upon information and belief, the Photograph was copied, stored and displayed
21 without license or permission, thereby infringing on Plaintiff's copyrights (hereinafter the
22 "*Infringement*").

23 24. The Infringement includes a URL ("*Uniform Resource Locator*") for a fixed
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1 tangible medium of expression that was sufficiently permanent or stable to permit it to be
2 communicated for a period of more than a transitory duration and therefore constitutes a specific
3 infringement. *17 U.S.C. §106(5); Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160
4 (9th Cir. 2007).

5 25. The Infringement is an exact copy of the entirety of Plaintiff's original image
6 that was directly copied and stored by Defendant on the Account.
7

8 26. Upon information and belief, Defendant takes an active and pervasive role in the
9 content posted on its Account, including, but not limited to copying, posting, selecting,
10 commenting on and/or displaying images including but not limited to Plaintiff's Photograph.
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12 27. Upon information and belief, the Photograph was willfully and volitionally
13 posted to the Account by Defendant.

14 28. Upon information and belief, the Infringement were not posted at the direction
15 of a "user" as that term is defined in 17 U.S.C. §512(c).

16 29. Upon information and belief, Defendant engaged in the Infringement knowingly
17 and in violation of applicable United States Copyright Laws.

18 30. Upon information and belief, Defendant has the legal right and ability to control
19 and limit the infringing activities on its Account and exercised and/or had the right and ability
20 to exercise such right.
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22 31. Upon information and belief, Defendant monitors the content on its Account.

23 32. Upon information and belief, Defendant has received a financial benefit directly
24 attributable to the Infringement.

25 33. Upon information and belief, the Infringement increased traffic to the Account
26 and, in turn, caused Defendant to realize an increase in its merchandise sales.
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34. Upon information and belief, a large number of people have viewed the unlawful copies of the Photograph on the Account.

35. Upon information and belief, Defendant at all times had the ability to stop the reproduction and display of Plaintiff's copyrighted material.

36. Defendant's use of the Photograph, if widespread, would harm Plaintiff's potential market for the Photograph.

37. As a result of Defendant's misconduct, Plaintiff has been substantially harmed.

FIRST COUNT
(Direct Copyright Infringement, 17 U.S.C. §501 et seq.)

38. Plaintiff repeats and incorporates by reference the allegations contained in the preceding paragraphs, as though set forth in full herein.

39. The Photograph is an original, creative work in which Plaintiff owns valid copyright properly registered with the United States Copyright Office.

40. Plaintiff has not licensed Defendant the right to use the Photograph in any manner, nor has Plaintiff assigned any of its exclusive rights in the copyrights to Defendant.

41. Without permission or authorization from Plaintiff and in willful violation of Plaintiff's rights under 17 U.S.C. §106, Defendant improperly and illegally copied, stored, reproduced, distributed, adapted, and/or publicly displayed works copyrighted by Plaintiff thereby violating one of Plaintiff's exclusive rights in its copyrights.

42. Defendant's reproduction of the Photograph and display of the Photograph constitutes willful copyright infringement. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 361 (1991).

43. Plaintiff is informed and believes and thereon alleges that the Defendant willfully infringed upon Plaintiff's copyrighted Photograph in violation of Title 17 of the U.S.

Code, in that they used, published, communicated, posted, publicized, and otherwise held out to the public for commercial benefit, the original and unique Photograph of the Plaintiff without Plaintiff's consent or authority, by using it in the infringing article on the Account.

44. As a result of Defendant's violations of Title 17 of the U.S. Code, Plaintiff is entitled to an award of actual damages and disgorgement of all of Defendant's profits attributable to the infringement as provided by 17 U.S.C. § 504 in an amount to be proven or, in the alternative, at Plaintiff's election, an award for statutory damages against Defendant for the infringement pursuant to 17 U.S.C. § 504(c).

45. As a result of the Defendant's violations of Title 17 of the U.S. Code, the court in its discretion may allow the recovery of full costs as well as reasonable attorney's fees and costs pursuant to 17 U.S.C. § 505 from Defendant.

46. As a result of Defendant's violations of Title 17 of the U.S. Code, Plaintiff is entitled to injunctive relief to prevent or restrain infringement of his copyright pursuant to 17 U.S.C. § 502.

JURY DEMAND

47. Plaintiff hereby demands a trial of this action by jury.

PRAYER FOR RELIEF

WHEREFORE Plaintiff respectfully requests judgment as follows:

That the Court enters a judgment finding that Defendant has infringed upon Plaintiff's rights to the Photograph in violation of 17 U.S.C. §501 et seq. and award damages and monetary relief as follows:

- a. finding that Defendant infringed upon Plaintiff's copyright interest in the Photograph by copying and displaying without a license or consent;

- b. for an award of actual damages and disgorgement of all of Defendant's profits attributable to the infringement as provided by 17 U.S.C. § 504 in an amount to be proven or, in the alternative, at Plaintiff's election, an award for statutory damages against Defendant for the infringement pursuant to 17 U.S.C. § 504(c), whichever is larger;
- c. for an order pursuant to 17 U.S.C. § 502(a) enjoining Defendant from any infringing use of any of Plaintiff's works;
- d. for costs of litigation and reasonable attorney's fees against Defendant pursuant to 17 U.S.C. § 505;
- e. for pre judgment interest as permitted by law; and
- f. for any other relief the Court deems just and proper.

DATED: April 13, 2022

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